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AUG 04 2014

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

RG14735550

GWENDOLYN BROWN, BERKELEY
POLICE ASSOCIATION,

Plaintiffs,

v.

CITY OF BERKELEY, BERKELEY
POLICE REVIEW COMMISSION,
DOES 1-50,

Defendants.

Case No.

COMPLAINT FOR DAMAGES; REQUEST FOR
INJUNCTIVE RELIEF (CAL. CODE CIV. PROC. §
525).

DEMAND FOR JURY TRIAL

Plaintiffs GWENDOLYN BROWN and BERKELEY POLICE ASSOCIATION complaint
against Defendants CITY OF BERKELEY, BERKELEY POLICE REVIEW COMMISSION, and
DOES 1 THROUGH 50 as follows:

PARTIES

1. Plaintiff Brown is, and all times mentioned herein was, a sworn police officer employed
by the Berkeley Police Department (hereinafter "the Department") and Defendant City of Berkeley.

2. Plaintiff Berkeley Police Association (hereinafter "the BPA") is, and at all times
mentioned herein was, a duly recognized employee organization and the recognized employee
organization representing sworn police officers employed by the Department. BPA brings this action

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1 on behalf of itself and its members.

2 3. Defendant City of Berkeley (hereinafter “the City”) is, and at all times relevant herein
3 was, a municipal corporation duly organized and existing under the laws of the State of California.
4 Defendant City maintains the Department and employs its police officers. Defendant City employs staff
5 for Defendant Berkeley Police Review Commission (hereinafter “the PRC”), appoints individual
6 commissioners, and provides stipends to compensate commissioners for service. (Ordinance No. 4644-
7 N.S. §§ 2, 6, attached to the Declaration of Chris Stines as Exhibit A.)

8 4. Defendant PRC is a citizens’ review board established by City of Berkeley Ordinance
9 No. 4644-N.S. and amended by Ordinance No. 5503-N.S. The PRC Ordinance gives the PRC authority
10 to investigate citizen complaints of misconduct lodged with the PRC against members of the
11 Department. The purpose of the PRC is to “provide for community participation in setting and
12 reviewing Police Department policies, practices and procedures and to provide a means for prompt,
13 impartial and fair investigation of complaints brought by individuals against the Berkeley Police
14 Department.” (Berkeley Mun. Code §3.32.010.)

15 5. The PRC is comprised of nine commissioners, each of whom is appointed by the
16 Berkeley City Council. PRC commissioners cannot be city employees, but receive compensation from
17 the City for their work which cannot exceed \$200 per month. (Exhibit A, §§ 2, 6.)

18 6. Plaintiffs are ignorant of the true names and capacities of Defendants Does 1 through
19 50, inclusive, and therefore sues these defendants by such fictitious names. Plaintiffs are informed and
20 believe and thereon allege that each defendant so named is responsible in some manner for the injuries
21 and damages sustained by Plaintiffs as set forth herein. Plaintiffs will amend their complaint to state
22 the names and capacities of Does 1-50, inclusive, if they are ascertained.

23 **GENERAL ALLEGATIONS**

24 7. On February 12, 2013, Berkeley police officers, including Plaintiff Brown, responded to
25 the home of Kayla Moore, due to a call from Ms. Moore’s roommate, who alleged that Ms. Moore was
26 violent, aggressive, and needed to be “5150’d.” (Kimberly Veklerov, *Leaked Documents Shed New*
27 *Light on Kayla Moore’s In-Custody Death*, the Daily Californian, May 7, 2014, attached to the
28 declaration of Chris Stines as Exhibit B.)

1 8. After contacting Ms. Moore, the officers learned that Ms. Moore had a warrant out for
2 her arrest. The officers subsequently attempted to take Ms. Moore into custody on the warrant. (*Ibid.*)

3 9. Ms. Moore became resistant when the officers attempted to take her into custody. The
4 officers struggled to place Ms. Moore under arrest; ultimately eight officers were summoned to the
5 scene. (*Ibid.*)

6 10. At some point during the arrest, the officers realized that Ms. Moore experienced
7 difficulty breathing. (*Ibid.*) The officers began life saving measures, including chest compressions,
8 calling for a CPR mask, and keeping Ms. Brown's airways open. (*Ibid.*) Tragically, Ms. Moore died
9 during the incident. (*Ibid.*)

10 11. The Department, the Alameda County District Attorney's Office, and the Alameda
11 County Coroner's Office each cleared the officers of any wrong doing during the incident. The coroner
12 determined that Ms. Moore died of a lethal level of opiates and cocaine, as well as morbid obesity and
13 a pre-existing heart condition. (*Ibid.*)

14 12. Ms. Moore's death sparked protests among activists in Berkeley. These protests
15 eventually led to a review of the incident by the PRC. The PRC reviews such incidents through a Board
16 of Inquiry (hereinafter "BOI") normally consisting of three PRC commissioners, or six persons in cases
17 of the death of a person. (PRC Rules and Regulations § V(A), attached to the declaration of Chris
18 Stines as Exhibit C.) Michael Sherman, Kiran Shinoy, Barbara Allen, Alison Bernstein, Karen Lohurst,
19 and Oliver Zerrudo served as commissioners on that BOI investigating to the incident involving Ms.
20 Moore. (Declaration of Chris Stines at 1:6-8.) Plaintiff Brown and other BPA members were required
21 to appear and testify about their contact with Ms. Moore before the BOI.

22 13. Following the evidentiary portion of a BOI, the commissioners deliberated outside the
23 presence of the parties. (Exhibit C, § VII(A).) In order to sustain an officer for misconduct, the
24 commissioners must find misconduct by a majority vote. (Exhibit C, § VII(B).)

25 14. According to the PRC's regulations in effect at the time, "all commission proceedings
26 relating to the investigation of a complaint against an officer are closed to the public." (Exhibit C, §
27 I(A).) Additionally, the regulations maintain that "each commissioner shall maintain strict
28 confidentiality." (Exhibit C, § V(D)(1)(a).) Commissioners "shall not publicly comment on any

1 complaints” to the PRC. (Exhibit C, § V(D)(2)(a).) Commissioners present during PRC hearings are
2 required “to sign a confidentiality and nondisclosure agreement.” (Exhibit C, § V(B)(1).)

3 15. BPA members are required to attend PRC hearings unless their attendance is excused by
4 the City Manager. (Subject Officer Testimony Memorandum, Michael Brown, Jul. 20, 1990, attached
5 to declaration of Chris Stines as Exhibit D.) On May 7, 2014, the Daily Californian, a UC Berkeley
6 student newspaper, published an extensive article detailing the PRC findings. (Exhibit A.) The article
7 claimed that information from the PRC was leaked to one of its reporters. (*Ibid.*) The article
8 additionally noted that the PRC found that Plaintiff Brown failed to constantly monitor Ms. Moore’s
9 vital signs during the incident. (*Ibid.*)

10 16. Upon learning about the disclosure of this information, the BPA demanded the City
11 conduct an investigation into the source of the leak. (Letter from Harry Stern, May 1, 2014, attached to
12 Declaration of Harry Stern as Exhibit E.) Pending that investigation, the BPA and its members
13 temporarily declined to participate in PRC proceedings. (Letter from Christine Daniel at 1, Jul. 10,
14 2014, attached to Declaration of Chris Stines as Exhibit F.) The City agreed not to require BPA
15 members to attend PRC and BOI hearings until July 12, 2014. (Exhibit B; Exhibit F at 1-2.) The City
16 conducted a personnel investigation to determine whether any City employee—including PRC staff,
17 but not PRC commissioners—had disclosed the information about the Moore incident and the finding
18 against Plaintiff Brown. The City’s investigation concluded that no City employee had disclosed the
19 information. (Exhibit F at 1.)

20 17. The City refused to conduct a formal investigation to determine whether a PRC
21 commissioner was the source of the leak. (Declaration of Chris Stines at 2:1-3.) The City claimed that
22 it does not have the authority to investigate PRC commissioners. (Declaration of Chris Stines at 2:3-4.)
23 At its June 11, 2014 meeting, the PRC commissioners adopted a resolution urging each commissioner
24 to sign a declaration under penalty of perjury stating that she or he did not provide the Daily
25 Californian, or any of its agents or representatives, with any confidential information relating to the
26 PRC hearing. (Resolution of the Police Review Commission, attached to the Declaration of Chris
27 Stines as Exhibit G.) Each member of the commission subsequently signed a declaration denying any
28 knowledge of the leak. With two exceptions, the declarations were identical. (Signed Declarations by

PRC Commissioners, attached to the Declaration of Chris Stines as Exhibit H.)

18. The June 11, 2014 resolution also admitted and acknowledged that the disclosure of the report to the Daily Californian “violated the principles of trust and confidentiality necessary” to the PRC. (Exhibit G.)

19. PRC hearings are expected to resume on August 6, 2014. (Declaration of Chris Stines at 2:5-6.) The agreed upon stay to excuse BPA members from attending said hearings expired on July 12, 2014. Two BPA members have been summoned to appear and testify. (Declaration of Chris Stines at 2:5-6.)

20. On August 1, 2014, Plaintiffs filed a Government Tort Claim with the City.

FIRST CAUSE OF ACTION

(Invasion of Privacy; Cal. Const. Art 1, § 1; Plaintiff Brown as to all Defendants)

21. Plaintiffs hereby re-alleges and incorporates by reference herein paragraphs 1 through 20 of this Complaint as thought fully set forth herein.

22. Plaintiff Brown had a legally protected privacy interest in the non-disclosure of PRC proceedings and reports by virtue of the PRC Regulations.

23. Plaintiff Brown has a reasonable expectation of privacy with respect to PRC proceedings and reports insofar as their non-disclosure to the public is concerned.

24. The improper use of the PRC proceedings and reports, to wit the disclosure of information that is to be maintained in the strictest of confidence to an unauthorized third party was a serious invasion of Plaintiff Brown’s privacy interests.

25. Plaintiff Brown has suffered severe emotional stress as well as damage to her professional reputation as a police officer as a result of the deliberate and unauthorized disclosure of confidential and private PRC information.

26. The disclosure of confidential and private information was a substantial factor leading to the harms suffered by Plaintiff Brown.

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SECOND CAUSE OF ACTION

(Intentional Infliction of Emotional Distress; Plaintiff Brown as to all Defendants.)

27. Plaintiffs hereby re-alleges and incorporates by reference herein paragraphs 1 through 26 of this Complaint as though fully set forth herein.

28. Defendants' release of confidential information concerning Plaintiff Brown was intentional and outrageous and done with reckless disregard for the great probability that said release would cause Plaintiff Brown to suffer emotional distress.

29. As a result of Defendants' actions, confidential and private information pertaining to Plaintiff Brown was released into the public and caused Plaintiff Brown to suffer severe emotional distress.

30. The Defendants' actions are a substantial factor in causing Plaintiff Brown's emotional distress.

THIRD CAUSE OF ACTION

(Negligent Infliction of Emotional Distress; Plaintiff Brown as to all Defendants.)

31. Plaintiffs hereby re-alleges and incorporates by reference herein paragraphs 1 through 30 of this Complaint as though fully set forth herein.

32. Defendants' release of confidential information concerning Plaintiff Brown was negligent, as the release of confidential information is a direct breach of the duty of care Defendants owed to Plaintiff Brown by virtue of the PRC's Regulations.

33. As a result of Defendants' actions, Plaintiff Brown has suffered serious emotional distress..

34. Defendants' actions are a substantial factor in causing Plaintiff Brown's emotional distress.

FOURTH CAUSE OF ACTION

(Negligence; Cal. Civ. Code § 1714, subd. (a); Plaintiff Brown as to all Defendants.)

35. Plaintiffs hereby re-alleges and incorporates by reference herein paragraphs 1 through 34 of this Complaint as though fully set forth herein.

36. Defendants City and PRC owed Plaintiff Brown a duty of care to maintain the

1 confidentiality of PRC proceedings as stated in the PRC's Regulations. Those regulations state that the
2 proceedings are closed to the public and "[r]ecords of these investigations shall be treated as
3 confidential and *will not be disclosed to members of the public.*" (Exhibit C at § I(A) (emphasis
4 added).) Additionally, each PRC member is required to maintain strict confidentiality and is barred
5 from speaking publicly on any complaints. (Exhibit C at § V(D)1(a)-(b).)

6 37. Despite knowledge of this duty of care, one or more Defendants released or allowed the
7 release of the PRC report regarding the Ms. Moore investigation to the public. This release of
8 information resulted in confidential, private information being released into a public forum; indeed, to
9 a student newspaper.

10 38. By virtue of the PRC's Regulations, Defendants owed a duty of care to Plaintiff Brown
11 regarding the confidentiality of the PRC proceedings. Moreover, the Defendants breached that duty of
12 care by releasing confidential information to the public.

13 39. As a direct result of the Defendants' breach of its duty of care, Plaintiff Brown suffered
14 a loss of privacy and infliction of severe emotional distress. The Defendants' actions were a substantial
15 factor leading to Plaintiff Brown's suffering such harm.

16 **FIFTH CAUSE OF ACTION**

17 **(Invasion of Privacy, 42 U.S.C. § 1983; Plaintiff Brown as to all Defendants.)**

18 40. Plaintiffs hereby re-alleges and incorporates by reference herein paragraphs 1 through
19 39 of this Complaint as though fully set forth herein.

20 41. Defendants' above-described conduct, wherein it is alleged that Defendants disclosed
21 confidential information regarding Plaintiff Brown's conduct discovered through the BOI to the Daily
22 Californian, deprived Plaintiff Brown of her right of privacy under the United States Constitution.

23 42. At all times described herein, Defendants acted under color of authority as employees,
24 agents, or officers of the PRC or City or both in depriving Plaintiff Brown of her right of privacy under
25 the United States Constitution.

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SIXTH CAUSE OF ACTION**(Contempt of Court; Cal. Civ. Code § 1209, subd. (a)(5); All Plaintiffs as to all Defendants.)**

43. Plaintiffs hereby re-allege and incorporate by reference herein paragraphs 1 through 42 of this Complaint as thought fully set forth therein.

44. On March 14, 2007, the Honorable Judge Winifred Smith issued a writ of mandamus commanding Defendants City and the PRC to “comply with the requirements of Penal Code section 832.7 and not disclose peace officer personnel records except in accordance with the specific enumerated contingencies contained therein, and to immediately cease permitting the public to access Police Review Commission investigations, reports, hearings, and findings.” (Writ of Mandate, Case No. 200205759, Mar. 14, 2007, attached to the Declaration of Harry Stern as Exhibit I.)

45. Records constituting complaints or investigations of complaints, constitute a “personnel” record under Penal Code section 832.7. (Cal. Pen. Code § 832.9, subd. (e).)

46. Defendants willfully violated Judge Smith’s order by disclosing confidential peace officer records in violation of Penal Code section 832.7, and by permitting public access to PRC reports. Plaintiffs are not suing for violation of Penal Code section 832.7; rather, Plaintiff’s bring this action on the basis that Defendants violated Judge Smith’s order.

SEVENTH CAUSE OF ACTION**(Injunctive Relief, Cal. Code Civ. Proc. §§ 526; All Plaintiffs as to all Defendants)**

47. Plaintiffs hereby re-allege and incorporate by reference herein paragraphs 1 through 46 of this Complaint as though fully set forth herein.

48. Plaintiff BPA requests that the Court issue an injunction prohibiting Defendants from mandating BPA members to appear and/or testify before the PRC. Said injunction would last until either: (1) the source of the leak is found and removed from the PRC and/or denied access to information relating to PRC proceedings and reports; or (2) all current PRC commissioners are replaced.

49. BPA members have a reasonable expectation of privacy in the proceedings and records of the PRC, as is codified by the PRC’s own regulations. BPA members’ expect that their participation in PRC proceedings is conditioned on the caveat that the proceedings, the records, and findings are all

1 confidential. BPA members have a beneficial interest in ensuring their privacy is protected.

2 50. Plaintiff Brown requests that the Court issue an injunction prohibiting Defendants from
3 mandating that she appear and/or testify before the PRC as set forth in paragraph 44.

4 51. Defendants' release of confidential information pertaining to Plaintiff Brown violated
5 the confidentiality provisions of the PRC's Regulations.

6 52. The City has failed to identify the source of the leak, but has determined that the source
7 was not one of the PRC staff members. Despite the City's inability to determine the source of the leak,
8 the same PRC commissioners who served during the BOI relating to the Moore incident—and thus
9 during the time the leak occurred—remain members of the PRC and continue in that capacity today.
10 Additionally, by signing nearly identical declarations and denying any knowledge or responsibility for
11 the leak of confidential information, PRC commissioners have conspired with Defendants in a
12 misguided effort to conceal the specific perpetrators of the wrongful acts and created the false
13 impression that Defendants are capable of appropriately protecting and maintaining the confidentiality
14 of its proceedings and records in the future.

15 53. There is a significant likelihood that future breaches of confidentiality will occur since
16 the source of the leak has not been identified and all of the PRC commissioners deny any knowledge of
17 or responsibility for the leak of confidential information.

18 54. Should additional breaches of the PRC's confidentiality requirements occur, BPA
19 members will suffer great and irreparable injury to their privacy rights.

20 55. Balancing the interests of the PRC to continue to conduct its business versus the BPA's
21 interest in protecting its members from confidentiality breaches results in finding that the BPA's
22 interest outweighs that of the PRC. The City will continue to be able to conduct internal affairs
23 investigations and issue discipline in the event that officer misconduct occurs. The PRC's ability to
24 conduct its business will only be temporarily restricted until either the source of the leak is identified
25 and removed or all board members are replaced. However, should a BPA member suffer another
26 breach of privacy, said member has no adequate remedy at law to address such a breach.

27 **PRAYER FOR RELIEF**

28 WHEREFORE, Plaintiff Brown requests judgment against each Defendant as follows:

1. For general damages according to proof;
2. For special damages according to proof;
3. For punitive damages as to the individual Defendants responsible for the leak of Plaintiff Brown's confidential information according to proof;
4. For Plaintiffs' cost of suit;
5. For issuance of injunctive relief, prohibiting Defendants from mandating the appearance and testimony of Plaintiff Brown before the PRC until either: (1) the source of the leak is found and removed from the PRC and/or denied access to information relating to PRC proceedings and reports; or (2) all current PRC commissioners are replaced; and
6. For such other relief as the court may deem just and proper.

Plaintiff BPA requests judgment against each Defendant as follows:

- A. For issuance of injunctive relief, prohibiting Defendants from mandating the appearance and testimony of any BPA member before the PRC until either: (1) the source of the leak is found and removed from the PRC and/or denied access to information relating to PRC proceedings and reports; or (2) all current PRC commissioners are replaced.
- B. For Plaintiff's cost of suit; and
- C. For such other relief as the court may deem just and proper.

Dated: August 4, 2014

Respectfully submitted,
RAINS LUCIA STERN, PC



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Attorney for GWENDOLYN BROWN and
BERKELEY POLICE ASSOCIATION